

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

November 21, 2008

Alan Steen  
Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa Drive  
Austin, Texas 78731

**VIA REGULAR MAIL**

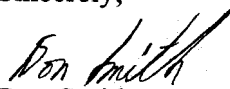
**RE: Docket No. 458-09-0368; Texas Alcoholic Beverage Commission vs. Jose Hugo Penaloza d/b/a El Vaquero**

Dear Mr. Steen

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.59(c), a SOAH rule which may be found at [www.soah.state.tx.us](http://www.soah.state.tx.us).

Sincerely,

  
Don Smith  
Administrative Law Judge

DS/mr  
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**  
Sandra Patton, Staff Attorney, Texas Alcoholic Beverage Commission, 427 W 20<sup>th</sup> Street, Suite 600, Houston, TX 77008- **VIA REGULAR MAIL**  
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- **VIA REGULAR MAIL**  
José Hugo Peñaloza d/b/a El Vaquero, Respondent, 10601 Duncum Street, Houston, TX 77013 -**VIA REGULAR MAIL**

**SOAH DOCKET NO. 458-09-0368**

**TEXAS ALCOHOLIC BEVERAGE  
COMMISSION**

**VS.**

**JOSE HUGO PENALOZA  
d/b/a EL VAQUERO  
PERMIT NO. BG654035, BL,  
HARRIS COUNTY, TEXAS  
(TABC CASE NO. 577180)**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

The staff of the Texas Alcoholic Beverage Commission (TABC or Commission) brought this enforcement action against Jose Hugo Penaloza d/b/a El Vaquero (Respondent) for an offense committed in violation of TEX. ALCO. BEV. CODE ANN. (Code) §§ 61.73 and 102.31. The alleged violation occurred on or about March 20, 2008, when Respondent, its agent, servant, or employee gave a check or draft for the purchase of beer that was dishonored when presented for payment, in violation of Code §§ 61.73 and 102.31

This Proposal for Decision finds the allegations by TABC to be proven and adopts the recommendation of the staff that the license be suspended for a period of 4 days or that Respondent be allowed to pay a civil penalty of \$600 in lieu of suspension.

**I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION**

The hearing in this matter convened on November 7, 2008, at the offices of the State Office of Administrative Hearings (SOAH) in Houston, Harris County, Texas. The staff of the Commission (Staff) was represented by its counsel, Sandra Patton. Respondent did not appear. Because the hearing proceeded on a default basis and Staff's factual allegations are deemed admitted as true, the ALJ has incorporated those allegations into the findings of fact without further discussion.

The Commission and SOAH have jurisdiction over this matter as reflected in the conclusions of law. The notice of intention to institute enforcement action and of the hearing met the notice requirements imposed by statute and by rule as set forth in the findings of fact and conclusions of law

## **II. EVIDENCE AND APPLICABLE STATUTORY PROVISIONS**

CODE § 61.73 authorizes the Commission to cancel or suspend a license for not more than 60 days if it is found, after notice and hearing, that the respondent gave a distributor a check for payment which is dishonored when presented for payment. As described in the findings of fact, Respondent violated CODE § 61.73 by writing a check to a distributor that was subsequently returned for insufficient funds

Staff introduced two exhibits into evidence:

Exhibit 1 is the affidavit of Amy Harrison, TABC Licensing Department Director, that Permit No. BG654035 was issued to Jose Hugo Penaloza, doing business as El Vaquero, 8714 La Porte Road, Houston, Harris County, Texas, by the Commission. The mailing address of Jose Hugo Penaloza is 10601 Duncum Street, Houston, Texas 77013. Attached to the affidavit is the permit and violation history.

Exhibit 2 is the US Postal Service Track & Confirm letter that the Notice of Hearing to Respondent by certified mail 7006 0810 0000 2143 5777 was returned to the sender on November 5, 2008 because it was not claimed by the addressee.

The ALJ took official notice of the notice of hearing in SOAH's file which shows the hearing was scheduled for November 7, 2008. The notice of hearing was mailed to Jose Hugo Penaloza d/b/a El Vaquero at 10601 Duncum Street, Houston, Texas 77013 by certified mail # 7006 0810 0000 2143 5777 on September 30, 2008.

### III. RECOMMENDATION

The notice of hearing, in bold lettering, states "**If you fail to appear at the hearing, the Commission will proceed without you and the allegation(s) in this notice will be deemed admitted as true, and the relief sought may be granted by default.**" Because Respondent failed to attend the hearing, the allegations that on or about March 20, 2008, Respondent gave a check or draft for the purchase of beer that was dishonored when presented for payment is deemed admitted as true. The permit should be suspended for a period of 4 days, or in lieu of suspension, Respondent should pay a civil penalty of \$600.00.

### IV. FINDINGS OF FACT

Permit No. BG654035 was issued to Jose Hugo Penaloza, doing business as El Vaquero (Respondent), by the Texas Alcoholic Beverage Commission (TABC).

2. The mailing address of Respondent is 10601 Duncum Street, Houston, Texas 77013.
3. TABC staff sent a notice of hearing regarding the violation of the Texas Alcoholic Beverage Code to the Respondent on September 30, 2008. The notice of hearing was returned to sender on November 5, 2008 because it was not claimed.
4. The notice of hearing also contained the following language in capital letter in 12 point or larger boldface type:

**If you fail to appear at the hearing, the Commission will proceed without you and the allegation (s) in this notice will be deemed admitted as true, and the relief sought may be granted by default.**

5. The hearing on the merits was held on November 7, 2008, at the offices of the State Office of Administrative Hearings, Houston, Harris County, Texas. Staff was represented by its counsel, Sandra Patton. Respondent did not appear and was not represented at the hearing.
6. The hearing proceeded on a default basis, and the factual allegations were deemed admitted.
7. On March 20, 2008, Respondent, or Respondent's employees gave a check or draft for the purchase of beer that was dishonored when presented for payment.

## V. CONCLUSIONS OF LAW

The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. § 61.71.

The State Office of Administrative Hearings has jurisdiction to conduct the administrative hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. ch. 2003.

- 3 Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Notice of the hearing was sufficient to allow entry of default judgment under State Office of Administrative Hearings Rules, 1 TEX. ADMIN. CODE § 155.55.
- 5 Respondent violated TEX. ALCO. BEV. CODE ANN. §§ 61.73 and 102.31 by giving a check or draft for the purchase of beer that was dishonored when presented for payment.
6. Based on the foregoing Findings of Fact and Conclusions of Law, a 4 day suspension of the permit and license is warranted. Pursuant to TEX. ALCO. BEV. CODE ANN. § 11.64, the Respondent should be allowed to pay a \$600 civil penalty in lieu of suspension of its permits.

**SIGNED November 21, 2008.**



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**DON SMITH**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

DOCKET NO. 577180

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION	§	
	§	
VS	§	
	§	
JOSE HUGO PENALOZA	§	
D/B/A EL VAQUERO	§	ALCOHOLIC
LICENSE NO(s). BG654035, BL	§	
	§	
HARRIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-09-0368)	§	BEVERAGE COMMISSION

**ORDER ADOPTING PROPOSAL FOR DECISION**

**CAME ON FOR CONSIDERATION** on this 8<sup>th</sup> day of January 2009, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Don Smith. The hearing convened on November 7 2008 and adjourned on the same day. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on November 21, 2008. This Proposal for Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. As of this date no exceptions have been filed.

The Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, that are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

**IT IS THEREFORE ORDERED** by the Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1 of the Commission Rules, that Respondent's permits are herein **SUSPENDED for four (4) days**.

**IT IS FURTHER ORDERED** that unless the Respondent pays a civil penalty in the amount of **\$600.00** on or before the **10<sup>th</sup> day of February 2009**, all rights and privileges under the above described permits will be **SUSPENDED for a period of four (4) days beginning at 12:01 A.M. on the 18<sup>th</sup> day of February 2009**.

This Order will become final and enforceable on February 2, 2009 unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

**SIGNED** this the 8<sup>TH</sup> day of January, 2009, at  
Austin, Texas.



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Alan Steen, Administrator  
Texas Alcoholic Beverage Commission

**ADMINISTRATIVE LAW JUDGE**  
State Office of Administrative Hearings  
2020 N. Loop West, Suite 111  
Houston, Texas 77018  
**VIA FACSIMILE (713) 812-1001**

Jose Hugo Penaloza  
d/b/a El Vaquero  
**RESPONDENT**  
10601 Duncum St  
Houston, Texas 77013  
**VIA U.S. FIRST CLASS MAIL**

Jose Hugo Penaloza  
D/b/a El Vaquero  
**RESPONDENT**  
8714 La Porte Road  
Houston, Texas 77012  
**VIA U.S. FIRST CLASS MAIL**

Licensing Services Division

Enforcement Services Division

SKP/aa

**TEXAS ALCOHOLIC BEVERAGE COMMISSION  
CIVIL PENALTY REMITTANCE**

**DOCKET NUMBER: 577180**

**REGISTER NUMBER:**

**NAME: JOSE HUGO PENALOZA**

**TRADENAME: EL VAQUERO**

**ADDRESS: 8714 LA PORTE RD., HOUSTON, TEXAS 77012**

**DUE DATE: JANUARY 27, 2009**

**PERMITS OR LICENSES: BG654035, BL**

**AMOUNT OF PENALTY: \$600.00**

Amount remitted \$ \_\_\_\_\_ Date remitted \_\_\_\_\_

You may pay a civil penalty rather than have your permits and licenses suspended if an amount for civil penalty is included on the attached order.

**YOU HAVE THE OPTION TO PAY THE CIVIL PENALTY ONLY IF YOU PAY THE ENTIRE AMOUNT ON OR BEFORE THE DUE DATE. AFTER THAT DATE YOUR LICENSE OR PERMIT WILL BE SUSPENDED FOR THE TIME PERIOD STATED ON THE ORDER.**

**Mail this form with your payment to:**

**TEXAS ALCOHOLIC BEVERAGE COMMISSION**

**P.O. Box 13127**

**Austin, Texas 78711**

**Overnight Delivery Address: 5806 Mesa Dr., Austin, Texas 78731**

**You must pay by postal money order, certified check, or cashier's check. No personal or company check nor partial payment accepted. Your payment will be returned if anything is incorrect. You must pay the entire amount of the penalty assessed.**

**Attach this form and please make certain to include the Docket # on your payment.**

\_\_\_\_\_  
Signature of Responsible Party

\_\_\_\_\_  
Street Address

\_\_\_\_\_  
P.O. Box No.

\_\_\_\_\_  
City

\_\_\_\_\_  
State

\_\_\_\_\_  
Zip Code

\_\_\_\_\_  
Area Code/Telephone No